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No. 391

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

GEORGE B. PARR, et al., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Since the Petition for Certiorari was filed in this case, and two days before the Government's Brief in Opposition was filed, the Court of Appeals for the Second Circuit handed down two opinions in square conflict with the decision below of the Court of Appeals for the Fifth Circuit. *McKeever v. United States* (2d Cir. November 10, 1959), printed in Appendix A hereto; *Zborowski* v. *United States* (2d Cir. November 10, 1959) printed in Appendix B hereto. In addition, a decision of the Court of Appeals for the Tenth Circuit has been reported which discloses, in majority and dissenting opinions, views which conflict with both the Second and the Fifth Circuits on the issue pre-

sented here. *Travis* v. *United States*, 269 F. 2d 928 (10th Cir. 1959), certiorari applied for, No. 479, October Term, 1959. These recent decisions furnish impelling reasons for a grant of certiorari here.

One of the principal questions presented in this case is whether it was error for the trial judge to deny a defense motion for access to the transcript of the testimony before a federal grand jury of one Heras, a vital witness for the prosecution.[1] As we showed in our Petition for Certiorari, pp. 9-10, there was abundant evidence in the record to furnish at least probable cause to believe that Heras' grand jury testimony would be inconsistent with his trial testimony. Cross-examination demonstrated numerous inconsistencies between Heras' testimony at the trial and his previous statements and testimony. Without going into detail, it is sufficient to repeat that the Court of Appeals itself noted that "Some inconsistencies and discrepancies were admitted by Heras, including an admission that he had sworn falsely in previous affidavits." *Parr* v. *United States*, 265 F. 2d 894, 902 (5th Cir. 1959).

Petitioners moved in the trial court for access to Heras' grand jury testimony. Contrary to the Government's statement here, petitioners' counsel made no assertions of "absolute right." Counsel simply made a "request" at the end of Heras' direct testimony (R. VIII, 2441). Counsel was just starting to justify this request when the trial judge cut off all argument by announcing that in his view the transcript was absolutely privileged and that he was denying the motion

[1] The Government disputes Heras' importance as a witness. As we have previously noted, his testimony covered 23% of the entire record. Most Government witnesses testified only briefly. Heras was an accomplice and major participant in the alleged scheme.

"subject to all risks" (R. VIII, 2441-2442).[2] The entire colloquy occupied only a moment. The judge did not even examine the transcript himself, but simply denied the motion in terms making plain that he believed he had no power to do otherwise, no matter what the facts or circumstances.

In *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, this Court held that a trial judge may properly deny access to grand jury minutes in a case where, to use the Court's words, "As we read the record the petitioners failed to show *any need whatever* for the testimony of the witness Jonas" (emphasis supplied). 360 U.S. 395, 400. But the Court also held disclosure to be "wholly proper" when a need for it exists. 360 U.S. 395, 400. The cases decided by the Second and Tenth Circuits hold that on a record such as the present one, showing a possibility of discrepancies between trial testimony and grand jury testimony, the trial judge has a clear duty to inspect the grand jury transcript for inconsistencies—a duty which cannot be excused on any of the grounds advanced here or below. The latter courts have also demonstrated that they give entirely different interpretations to the *Pittsburgh Plate Glass* case than that offered to support the judgment below.

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[2] The Government is at pains to point out that "Although petitioners now advance various arguments as to why they needed the transcript (Pet. 9-10), they did not seek it on these bases at the trial." (Brief in Opp. p. 19). Of course petitioners did not. It should be apparent from the record that the petitioners were precluded by the trial judge from making the arguments advanced here. The refusal of the trial judge to consider the defense motion, or his refusal to exercise his discretion at all, on the ground of his lack of power, is one reason why review is now being sought.

I. The Trial Judge's Duty

In *McKeever v. United States, supra*, the defendants were charged with violations of the Anti-Racketeering Act, 18 U.S.C. § 1951. During the cross-examination of each Government witness the defense requested the transcript of his grand jury testimony. So far as appears, each time the defense simply made a request as in the present case, and made no specific statement as to need with respect to any of the witnesses (*infra*, p. 5a). With one exception the trial court denied each request. The Court of Appeals, after reading the transcript itself, reversed the convictions for failure to make available certain portions of testimony of two other witnesses, which the court found contained discrepancies. The court held that the duty of the trial court is as follows (*infra*, pp. 6a-7a):

> "In this Circuit the procedure whereby grand jury testimony may be made available to the defense is well established. After a government witness has testified on direct examination, *if there appears to be some basis for supposing that his grand jury testimony may be at variance with his trial testimony*, the defense may ask the trial judge to examine the witness' grand jury testimony. If the trial judge finds any material discrepancy between the trial testimony and the grand jury testimony, such part of the minutes is made available to the defendant. *United States* v. *Spangelet*, 258 F. 2d 338 (2 Cir. 1958)." (Emphasis supplied.)

Thus, the Court of Appeals held that whenever there is "some basis" to believe that discrepancies may exist, the trial judge must inspect the transcripts, and cannot simply deny the motion for production without determining if there are inconsistencies.

Zborowski v. *United States*, *supra*, is a perjury case, but the grand jury testimony involved was that of a prosecution witness, not the defendant's own testimony. The defendant was convicted of perjury committed before a federal grand jury. The testimony in question related to whether or not he had ever met one Jack Soble. Soble was a witness for the prosecution and the defense moved for production of his grand jury testimony. The motion was denied and the Court of Appeals held this to be error and reversed. Speaking of the judge's duty, the Court of Appeals said (*infra*, p. 20a):

> "For many years it has been the unvarying practice in this Circuit to permit defense counsel to use inconsistent grand jury testimony for impeachment purposes. The rule is that when the defendant points out *a possible inconsistency* between the trial and the grand jury testimony of a government witness and requests the trial judge to examine the witness' grand jury minutes, the trial judge must then read the minutes in camera. Finding any substantial discrepancy, he must make available to the defendant the minutes or an intelligible segment thereof containing the inconsistency. But where the trial judge finds no such inconsistency, he should, upon request, seal the grand jury testimony so that it is available on appeal. . . ." (Emphasis supplied.)[3]

In the *Zborowski* case the witness Soble had admitted that there were discrepancies in his grand jury

[3] The Second Circuit distinguished the Fifth Circuit's decision in the instant case on the ground that "In *Parr* the defendant made no request that the court examine the minutes *in camera*." This statement is apparently based upon the Fifth Circuit's opinion which disregards the fact that the trial judge took the position he was without any discretion to consider the request.

testimony. But the Court of Appeals did not rest its decision on this ground. In the first place, the court noted that the Government's bill of particulars differed from Soble's testimony in certain respects and indicated that this difference would be sufficient by itself to justify a defense request for the transcript (*infra*, p. 21a):

> "These discrepancies between the government's bill of particulars and Soble's trial testimony supported the defense claim that there *might be inconsistencies* between Soble's grand jury testimony and his trial testimony. Under these circumstances, the trial judge should have examined the grand jury minutes." (Emphasis supplied)

In the second place, the court states that it would apply an even stronger rule in perjury cases and cases where one witness furnishes all the direct evidence. In such cases, the Second Circuit would require inspection "Even if there was no showing of possible inconsistency. . . ." (*infra*, p. 22a).

In *Travis* v. *United States*, *supra*, a case involving an allegedly false non-Communist affidavit, a divided Court of Appeals for the Tenth Circuit upheld the trial court's refusal to grant access to grand jury transcripts of Government witnesses' testimony despite a showing of inaccuracies in such testimony, because the inaccuracies were not "material." Neither the trial court nor the Court of Appeals read the grand jury transcripts. The Court of Appeals held that it was "unlikely" that the grand jury testimony "would produce impeaching material." 269 F. 2d 928, 945. Speaking for the majority, Judge Lewis said (269 F. 2d 928, 945-946):

> Appellant shows inaccuracies in the testimony of the witnesses (i. e. Gardner thought he had testified in another case the prior week but actually it was two weeks earlier; Eckert had testified on seven previous occasions against Mine-Mill but his testimony as to details was not precisely the same on each occasion; Gardner's evidence at trial was not shown on the reports which he made to the F.B.I.; Mason stated to the F.B.I. that he was "unable to enlarge" on information about appellant, but at trial gave other specific information); these inaccuracies might well give rise to argument concerning the witnesses' memories and powers of observation which were available to the defense from the materials produced by the government. They do not demonstrate a reason for believing that the witnesses' testimony was biased or impeachable on material fact. They do not compel the conclusion that the testimony before the grand jury requires further investigation.

Thus the majority held that the trial judge has a duty to inspect transcripts if, but only if, the defense points out *material* inconsistencies in other testimony. On the other hand, Judge Murrah, dissenting, argued that the judge has a duty to inspect even if no likelihood of inconsistency has been shown:

> "I would reverse this case and remand it for a new trial for the refusal of the trial court to examine the grand jury evidence in camera, to determine whether the lid of secrecy ought to be lifted in the interest of the proper administration of criminal justice. We know that grand jury testimony may be disclosed only upon a showing of a particularized need, and the burden of showing that need is on the one seeking it. But if the rule is to have any efficacy, its burdens ought not to be insurmountable.

> How then may the accused lay a foundation for requisite inconsistency when he does not have access to the testimony or any other means except cross-examination in the hope that something will turn up? In our case the cross-examination of the prosecuting witnesses disclosed that they had testified in numerous cases of this kind, as well as before the grand jury which had indicted the accused. There were some inconsistencies in the testimony they had given in other open proceedings. But there was no conceivable way of showing a particularized need unless the accused could get the grand jury testimony before the court." 269 F. 2d 928, 946.

In summary, the Court of Appeals for the Second Circuit has taken the position that where the record contains evidence to suggest that there may be inconsistencies between a witness's trial testimony and his grand jury testimony it is the duty of the trial judge to determine whether inconsistencies do exist and to make the transcript available if they do. The judges of the Tenth Circuit agree that a duty exists, but disagree as to when it must be exercised. In the present case the trial judge failed to exercise that duty despite an overwhelming showing of probability that inconsistencies would be found.

We think it should be added that under the Second Circuit rulings the prosecution also has a duty to see that transcripts containing discrepancies are made available to the defense. In a footnote to the *McKeever* case the court said (*infra*, p. 6a):

> "However, it is appropriate to point out that the government should be prepared to advise the trial judge regarding possible discrepancies between trial and grand jury testimony. See *United States*

v. *Spangelet*, 258 F. 2d 338, 342 (2 Cir. 1958). Indeed we feel that it is the duty of the prosecutor to consent to make such testimony available where there is a reasonable basis for believing that the testimony differs on matters which are not immaterial. See *United States* v. *Zborowski* (2 Cir. 1959), filed November 10, 1959."

II. Denial of Access on the Ground Evidence Would Be Cumulative

The Court of Appeals for the Fifth Circuit held in the instant case that the trial judge was entitled to deny access to the grand jury transcript because any evidence found therein would be merely cumulative:

> "The defendant's counsel cross-examined witness Heras, whose grand jury testimony was requested, for five days. On the basis of prior statements furnished by government counsel under the Jencks rule and prior sworn testimony of Heras in earlier trials, counsel demonstrated to the satisfaction of the Court that Heras was an accomplice in the alleged offenses. The Court so charged the jury. Counsel also demonstrated numerous inconsistencies in Heras' testimony and prior statements, and drew from him a concession that he had sworn falsely in a statement to the investigating agents. *It may well be that the trial court considered that any additional inconsistent testimony that the grand jury transcript might show Heras had given would be merely cumulative* in the same way the court thought the testimony would be cumulative in H.J.K. Theatre Co., supra." 265 F. 2d 894, 903. (Emphasis supplied).

This holding is in square conflict with the holding of the Second Circuit in *Zborowski* (*infra*, pp. 22a-24a):

> "The government argues that even if it was error for the trial judge not to make the grand

jury minutes available to the defendant, that, in any event, this grand jury testimony would have been "unimportantly cumulative as an impeachment device." We do not agree.

The government points out that Soble was subjected to intense and detailed cross-examination for nearly three days; that defense counsel had available for this purpose the reports of several doctors at both state and federal institutions including the complete medical treatment dossier maintained at the Medical Center for Federal Prisoners; that the defense had available numerous F.B.I. reports of interviews with Soble and Soble's reports and correspondence to his Soviet superiors which had been intercepted. . . .

Of course the fact that there was available to the defense a great mass of other data with which to impeach Soble can be no answer to the failure to produce the grand jury minutes if there were in those minutes any statements or omissions which were inconsistent with the witness' testimony at the trial.

Moreover, Soble's grand jury testimony by reason of the very fact that it was under oath and before a grand jury had about it a character and an importance far greater than any of the other impeaching evidence. . . .

It is not for an appellate court to speculate how much difference the grand jury testimony might have made in the deliberations of the trial jury. Rosenberg v. *United States, 360 U.S. 367, 371 (1959). No one can ever say in a particular case just what bit of evidence might turn the tide one way or the other. In every case where a jury has rendered a conviction and where other impeaching evidence is available, it could be argued that the grand jury evidence was merely cumulative. But, of course the point of allowing free and full cross-examination of an important witness is to permit*

this very cumulation of evidence. So long as evidence of this nature is relevant it ought to be freely available to a defendant for whatever use he may wish to make of it." (Emphasis supplied.)

The decision below in the instant case permits and indeed requires the trial court to usurp the function of the jury. It permits the trial court to suppress evidence bearing on credibility if the court thinks (without even inspecting the transcript) that the evidence would not affect the outcome. We think it is not the trial court's function to say whether evidence of lying by a particular prosecution witness would affect the jury's verdict on the whole case. On the contrary, it is the court's duty to see that the defense is not deprived of the right to use such evidence. The defense in a criminal case has a *right* to such evidence which cannot be diluted by a court which thinks the defendants are guilty anyway.

III. The Meaning of "Particularized Need"

The Government, in its Brief in Opposition here, does not, as indeed it could not, deny that there is overwhelming evidence that the witness Heras was prone to lie under oath with respect to the present case. Instead, the Government attempts to avoid this stark fact by proposing a new meaning for the phrase "particularized need" as used in this Court's decision in *Pittsburgh Plate Glass Company* v. *United States*, *supra* (Brief in Opp., p. 20). On this point also there is a conflict with *McKeever*, *Zborowski* and *Travis*.

The Government says there was no "particularized need" because (a) the witness Heras' testimony did not deal with every aspect of the case; (b) there was "substantial independent evidence in addition to

Heras' testimony that petitioners misappropriated large amounts of School Board funds . . ."; and (c) the defense had other material with which to cross-examine Heras (Brief in Opp., pages 20-22).

The Court will note that the Government never makes any reference to what we believe, under the *Pittsburgh Plate Glass* case, to be the vital question governing access to grand jury transcripts—whether the record demonstrates a likelihood that the transcripts would furnish evidence of discrepancies that would impeach an important prosecution witness. Thus, the Government does not even discuss whether the record does in fact suggest that Heras was untrustworthy, that he had previously lied under oath and in other grand jury testimony, and that he may well have lied in the grand jury testimony in question. Instead, the Government takes the position that it does not matter whether or not the transcripts might impeach the witness, if the trial court thinks there is enough other evidence to convict.

We submit that the court below and the Government have fundamentally misconceived the import of this Court's ruling in the *Pittsburgh Plate Glass* case. "Particularized need", as used in that case, does not involve the weight of the evidence; it refers specifically to the statement in the earlier *Procter & Gamble* decision that the use of the grand jury transcript at the trial "to impeach a witness, to refresh his recollection, to test his credibility and the like" are cases of "particularized need where the secrecy of the proceedings is lifted discretely and limitedly."[4] Thus the

[4] *United States* v. *Procter & Gamble Company*, 356 U.S. 677, 683 quoted in *Pittsburgh Plate Glass Company* v. *United States*, *supra*, at 399.

phrase "particularized need" refers in the present context to whether or not the grand jury minutes in question would reveal contradictions of Heras' testimony at the trial. If a showing was made that such contradiction is probable, we think that under *Pittsburgh Plate Glass* a "particularized need" was demonstrated.

In the *McKeever* and *Zborowski* cases the Second Circuit made perfectly clear that it believes inconsistency or other impeaching material to be the proper test of "need" for grand jury transcripts. In *McKeever* the court, without discussing other evidence bearing on the defendants' guilt, simply said that "If the trial judge finds any material discrepancy between the trial testimony and the grand jury testimony, such part of the minutes is made available to the defendant" (*infra*, p. 7a). In *Zborowski* the court reiterates this point and expressly rejects the suggestion that the defense's right to make use of inconsistencies can in any way be affected by other evidence in the case.

In *Travis* it is also clear that the court deemed inconsistency to be the proper test of "particularized need". Judge Lewis, in explaining the majority's finding that there had been an insufficient demonstration of "particularized need," stated repeatedly that the issue was whether there was a likelihood of "inconsistencies" (269 F. 2d 928, 945); he never once suggested that the existence of other evidence might affect the trial judge's duty.

The decision below invites confusion and misinterpretation of this Court's rulings on disclosure of grand jury transcripts. It invites trial courts to construe "particularized need" to permit them to base rulings on access to grand jury testimony on their views as to whether the witness sought to be impeached is suffi-

ciently important, whether his testimony is corroborated by independent evidence, and whether the defense has other "extensive material to use" for cross-examination (Brief in Opp. page 22). If such considerations, and not the likelihood of discrepancies, are to govern access, then under the *Pittsburgh Plate Glass* case trial courts can, on nothing but their own ipse dixit, bar the defense from presenting to the jury vital evidence on credibility. We are convinced that this Court did not intend any such result.

CONCLUSION

The recent decisions of the Courts of Appeals for the Second and Tenth Circuits underscore the vital importance of this case in the fair administration of criminal trials. For these additional reasons, we respectfully submit that a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 327 — October Term, 1958.

(Argued June 2, 1959 Decided November 10, 1959.)

Docket No. 25492

UNITED STATES OF AMERICA, *Appellee*,

v.

THOMAS McKEEVER and LAWRENCE MORRISON, *Appellants*.

Before:

CLARK, *Chief Judge*,

LUMBARD and WATERMAN, *Circuit Judges*.

Defendants were tried on an indictment charging them with conspiring to obstruct the movement of goods in interstate and foreign commerce by means of extortion in violation of the Anti-Racketeering Act, 18 U. S. C. § 1951, and with forty-two substantive violations of the same section. The United States District Court for the Southern District of New York, William B. Herlands, *J.*, after a jury verdict of guilty, entered judgment and defendants appeal. Held, that it was error for the trial court to refuse to turn over to defendants certain grand jury testimony of two government witnesses which testimony conflicted with their testimony at trial; and that it was error for the trial court to decline to make available to the defense certain F.B.I. reports without at least conducting *voir dire* examination to see whether the reports should

have been made available pursuant to 18 U. S. C. § 3500. Reversed and remanded.

OTIS PRATT PEARSALL, Assistant United States Attorney, Southern District of New York, New York, N. Y. (S. Hazard Gillespie, Jr., United States Attorney and George I. Gordon, Assistant United States Attorney, on the brief), *for appellee.*

HENRY A. LOWENBERG, New York, N. Y., *for appellants.*

LUMBARD, *Circuit Judge:*

Thomas McKeever and Lawrence M. Morrison appeal from sentences of five years imprisonment, with five additional years on probation, following their convictions for conspiracy and extortion in violation of the Anti-Racketeering Act, 18 U. S. C. § 1951. The indictment charged a conspiracy to obstruct the movement of goods in interstate and foreign commerce by means of extortion, together with forty-two counts of extortion, on all of which both defendants were convicted.

The appellants raise three questions on this appeal: first, whether the grand jury testimony of certain government witnesses should have been turned over to the defendants; second, whether certain F.B.I. reports of interviews with government witnesses should have been made available pursuant to 18 U. S. C. § 3500; and third, whether the trial judge should have permitted the jury to hear a tape recording of a conversation between a principal government witness, Jack Ball, and the defendant McKeever, which recording was offered during Ball's cross-examination, first to refresh his recollection, and later to impeach him.

We find error in the trial judge's refusal to make available certain portions of the grand jury testimony of the government witnesses Thomas McGinn and Jack Ball and as that error was substantial we reverse the convictions. We also find error in the failure of the trial court to conduct *voir dire* examination of government agents preliminary to determining whether some of their reports of conversations with government witnesses should have been made available to the defense pursuant to 18 U. S. C. § 3500.

We briefly summarize the evidence, all of which was adduced by the government, as the defense called no witnesses.

In June of 1955 James J. Ball & Sons, Inc., an export packing company at 32 Moore Street, New York City, entered into a contract with Local 205 of the Independent Longshoremen's Association with respect to their warehouse workers and coopers. The company's steamship pier workers were already organized in I. L. A. Local 1171. Under the new contract the wages of the Local 205 employees were approximately doubled and the union on its part agreed that it would make every effort to organize employees of Ball company's competitors. The union representatives in these negotiations were the defendants McKeever and Morrison.

In June 1955 the Ball company's quotation on a large job for the Marion Shipping Co. was accepted and it became important to make sure through McKeever and Morrison that the men would be available for the job and that the pay rates for the Local 205 employees, which were still lower than the 1171 wages, would apply with respect to work to be done by the Local 205 men on the piers, rather than the higher 1171 rates. Jack Ball and Fred Ford, president of James J. Ball & Sons, Inc., had several discussions with McKeever and Morrison about the pay

rates, but McKeever and Morrison were adamant in insisting that the higher 1171 rates would have to be paid to all employees working on the piers.

At a lunch conference at the Meurat Club, Jack Ball said to the two union men "Leave us alone and get off our back and go out and organize some of our competitors instead of bothering us." Either McKeever or Morrison replied "That takes money."

A few days after the Meurat Club meeting, Jack Ball talked to McKeever and Morrison in front of 32 Moore Street. They wanted to know why no money was there for them and Ball asked what was expected. According to Ball's testimony at the trial, McKeever and Morrison then requested $300 a week. When Ball indicated that the demand was impossible and would put the company out of business, McKeever and Morrison finally agreed to accept $100 a week. Ball testified that he agreed to this because of fear of a work stoppage. Ford in his testimony also stated that this fear was the reason for the payments. In addition, George Ball, Jack's brother, testified that Jack spoke to him at about this time and said that he would have to pay off the union because he was afraid.

Following the agreement to pay $100, McKeever and Morrison, or one of them, came to the company office each Friday and were given $100 in cash. On the first Friday, which was September 9, 1955, no receipt of any kind was given, but after Ball requested some receipt, McKeever and Morrison furnished freight bills each week, all of approximately $100. The exhibits included three such bills from the P. M. Transfer Co. and three bills from the Roberts Motor Freight Co. According to the testimony of the 205 shop steward, McGinn, he and Morrison removed the remaining freight bills from the company files some time in the fall of 1956. At no time did P. M. Transfer Co. or Roberts Motor Freight Co. perform any trucking

services for the Ball company. John Masiello, who operated the P. M. Transfer Co., testified that McKeever, who was a friend of his, secured some trucking receipt blanks from him on a pretext.

Altogether there were forty-two payments of $100; Jack Ball himself made ten or fifteen such payments and he testified that three such payments were made by Ford. McGinn testified that on six to nine occasions he delivered the money. Still other payments were made by William Weilberg, the bookkeeper until February 1956, and thereafter by Meyer Wisotski, who succeeded him. On two occasions Wisotski gave the money to a messenger after McKeever had telephoned him that someone would pick it up.

After his arrest by the F.B.I., Morrison stated that he had never received any payment from the company or anyone connected with it, other than payments for union dues or initiation fees, and he specifically denied receiving $100 weekly during the period in question. Despite Morrison's statement, as the trial progressed, the defense strategy centered not upon denying the payments but upon establishing that they were made voluntarily to finance the union's efforts to organize competitors rather than out of fear of a work stoppage, as the government claimed. Indeed, in their summations, both defense counsel as much as conceded that the $100 weekly payments had been made and argued that they had been made for the purpose of organizing the company's competitors.

The Grand Jury Testimony of Thomas McGinn and Jack Ball

During the cross-examination of each government witness the defense asked for the production of the grand jury testimony of that witness. Upon each occasion the trial judge thereupon read the grand jury testimony of

the witness[1] and except for most of the testimony of Irving Altman he declined each request. We have therefore examined the grand jury testimony of Jack Ball, Thomas McGinn, Meyer Wisotski, Fred Ford and Irving Altman. We conclude that the trial judge was in error in not making available certain portions of the testimony of Jack Ball and Thomas McGinn.[2]

The propriety of disclosing any testimony given before the grand jury rests upon Rule 6(e) of the Federal Rules of Criminal Procedure and derives from the time-honored and well established principle that whatever happens before the grand jury should be kept secret unless and until the court is of the opinion that there is no longer a good reason for secrecy. *United States* v. *Procter & Gamble Co.*, 356 U. S. 677 (1958). In this Circuit the procedure whereby grand jury testimony may be made available to the defense is well established. "After a government witness has testified on direct examination, if there appears to be some basis for supposing that his grand jury testimony may be at variance with his trial testimony, the defense

[1] We think the trial judge's examination of the minutes, without requiring a showing of possible inconsistency, was the proper and desirable course. See *United States* v. *Zborowski* (2 Cir. 1959), filed November 10, 1959; *Jencks* v. *United States*, 353 U. S. 657 (1957); and *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, 401 (1959) (dissenting opinion).

[2] We think it unnecessary to pass upon the trial judge's exclusion of the balance of the grand jury testimony of Jack Ball and McGinn and that of the other witnesses. As such questions may arise in a somewhat different context at a new trial no purpose would be served in doing so now. However, it is appropriate to point out that the government should be prepared to advise the trial judge regarding possible discrepancies between trial and grand jury testimony. See *United States* v. *Spangelet*, 258 F. 2d 338, 342 (2 Cir. 1958). Indeed we feel that it is the duty of the prosecutor to consent to make such testimony available where there is a reasonable basis for believing that the testimony differs on matters which are not immaterial. See *United States* v. *Zborowski* (2 Cir. 1959), filed November 10, 1959.

may ask the trial judge to examine the witness' grand jury testimony. If the trial judge finds any material discrepancy between the trial testimony and the grand jury testimony, such part of the minutes is made available to the defendant. *United States* v. *Spangelet*, 258 F. 2d 338 (2 Cir. 1958).

Jack Ball was the only witness who testified to the talk at which McKeever and Morrison demanded money and finally agreed to accept $100 a week. It was Ball's testimony at trial that the defendants had first asked for $300 a week and that after he remonstrated with them and told them that this was crazy they finally agreed to $100. Before the grand jury Ball was asked these questions and gave these answers:

> "Q. . . . where did the amount come from, the amount of $100 a week? A. I really don't recall how we came to the agreement of $100 a week. I don't recall.
>
> . . . . . .
>
> Q. Do you recall who decided on the amount of $100 a week? A. It was either McKeever or Morrison, one of the two of them.
>
> Q. Did they tell you directly that 'We want $100 a week'? I want your best recollection on this. Can you recall what was said about the amount of money? Let me rephrase it: Did you decide that $100 a week should be paid? A. No. They brought it up, but I don't know how they phrased it.
>
> . . . . . .
>
> Q. Did anyone say to you directly—do you recall—'Pay us $100 a week'? A. It was $100 a week. I don't know if it was said in those words.
>
> . . . . . .
>
> Q. When they came around together, did they ask for $100 a week or did they mention the one hundred

dollar sum, or what did they say, if you can recall? A. They mentioned the $100. I forget if they wanted more or what.

* * * * *

Q. Did they mention a sum? A. They mentioned $100. I forget if they wanted more, and I just said that was too much."

In determining whether or not they would believe Jack Ball's story, in whole or in part, it was material for the jury to know that during his grand jury testimony, given some ten months prior to his trial testimony, he had been unable to remember whether any amount other than $100 had been mentioned.

Surely it was important for the jury to know whether McKeever and Morrison had first demanded $300 or whether they had merely talked about $100. If they had only asked for $100, it might well be argued that that was more consistent with a proper solicitation for money to be used in organizing the company's competitors.

We also believe that certain portions of McGinn's grand jury testimony should have been made available to the defense because that testimony may have had an important bearing on the jury's estimate of McGinn's credibility. At trial McGinn testified that he knew the envelopes which he gave McKeever and Morrison contained $100 because it was the bookkeeper's practice to count out the money and place it in the envelope in his presence. Before the grand jury he had testified in effect that he knew that there was $100 in the envelopes because he opened them. Had McGinn's trial testimony been concerned solely with the fact of the $100 weekly payments, we would not think that the failure to disclose this discrepancy was of sufficient importance to require reversal in view of the fact that the defense virtually conceded the payments had been made. But McGinn also testified at trial that he and

Morrison, at Morrison's suggestion, went to the Ball company's office one evening after all the employees had left and extracted some of the freight bills from the files. Of course this evidence would tend to show consciousness of guilt on the part of Morrison and, in view of the conflicting claims which the jury had to resolve, McGinn's testimony at trial about rifling the files may have carried great weight with the jury.

Therefore we conclude that the discrepancy in McGinn's grand jury testimony about his knowledge of the contents of the envelopes might have had an important bearing on the jury's appraisal of his crediblity with respect to matters other than the weekly delivery of the $100. It was error for the trial judge to refuse to disclose to the defendants this portion of McGinn's grand jury testimony.

The F.B.I. Reports

Many of the government witnesses were interviewed by the F.B.I. on numerous occasions and defense counsel called for the production of the F.B.I. reports relating to these conversations, citing the *Jencks* decision, 353 U. S. 657 (1957), and 18 U. S. C. § 3500.

Whether such F.B.I. reports should be made available to the defense after a witness has testified on direct examinaton is a far different question from whether the grand jury minutes of that witness should be made available.

Following the Supreme Court decision in *Jencks, supra*, the Congress enacted 18 U. S. C. § 3500. This statute defines the right of the defense to inspect a "statement" of a prosecution witness made to an agent of the government if the "statement" in the government's possession is, *inter alia*, "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made

by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U. S. C. § 3500(e)(2).

From the legislative history of § 3500 it is clear that the Congress had two purposes in mind. In the words of Senator O'Mahoney, 103 Cong. Rec. 16487 (1957), "The purpose of the bill is to protect the files of the Government against unwarranted disclosure and at the same time to preserve due process of law for defendants in criminal cases." Due process is afforded defendants under the *Jencks* statute by the provision that there should be available for cross-examination of government witnesses any documents which contain recitals substantially in the words of the witness.

With respect to reports, it is immaterial whether or not the report of what the witness has told the agent is at variance with his trial testimony. If the report meets the tests of § 3500 such parts of it as relate to the case on trial must be delivered to the defendant.

During the trial the court examined all of the F.B.I. reports *in camera*, and on the basis of this examination alone the court ruled that certain signed statements of McGinn and Ford be made available and that none of the other reports met the statutory requirements, apparently concluding that the reports were not "substantially verbatim." While in many cases such an inspection would be sufficient to indicate with reasonable certainty that the statute's terms had or had not been met, we think that as to some exhibits[3] further information was required to assist the court in its determination. See *Palermo* v. *United States*, 360 U. S. 343, 355 (1959). None of the reports in question is entirely a verbatim recital of a witness' oral statements. Each, however, appears to set

[3] Exhibits 23, 24 and 25 regarding Jack Ball, 30 regarding Wisoński and 40 and 41 regarding Altman.

out the substance of the interviewee's remarks, occasionally in quotation marks, and seems not to contain the comments or ideas of the interviewer. Additionally, it is clear that a number of the reports were not transcribed until several weeks after the interviews to which they relate took place, though in some instances notes were contemporaneously made. In short, it is not clear whether these reports are or are not within the statute's requirements. Under these circumstances it was not enough merely to read the documents in question. The proper course would have been for the trial court to conduct *voir dire* examinaton to obtain further evidence bearing on the issues raised by the statutory requirements. See *Papworth* v. *United States*, 256 F. 2d 125, 129 (5 Cir. 1958), cert. denied, 358 U. S. 854 (1958), affirming 156 F. Supp. 842, 853 (N. D. Tex. 1957); *United States* v. *West*, 170 F. Supp. 200, 210 (N. D. Ohio 1959). The exclusion of these reports without *voir dire* examination was error.

Among the factors which the trial court should consider as bearing upon the question whether a report is "substantially verbatim" are the extent to which it conforms to the language of the witness, see *United States* v. *Stromberg*, 268 F. 2d 256, 273 (2 Cir. 1959); *United States* v. *Waldman*, 159 F. Supp. 747, 749 (D. N. J. 1959); the length of the report in comparison to the length of the interview, see *Palermo* v. *United States*, *supra* at 355, n. 12, and the lapse of time between the interview and its transcription, see *id.* at 352-53. Where notes have been made, it would be pertinent to inquire into the lapse of time between the interview and the note-making, and between the note-making and the report in question. Additional factors will no doubt suggest themselves in each case.

In every case, however, the statute must be interpreted with a mind to the fact that only a substantially verbatim, not a precisely verbatim, recital of the witness' pre-trial

oral statement is required; and the recording made of this statement—of which the document sought may be either the original or a "transcription"—need be only contemporaneously, not simultaneously made. Moreover, the statutory language should not be construed so narrowly as to lose sight of the congressional purposes—to exclude the subjective impressions and opinions of the person making the report and to prevent the use of "statements to impeach a witness which could not fairly be said to be the witness' own," *Palermo* v. *United States*, *supra* at 350.

The Tape Recording

A further and separate contention of the defendants, that the court should have permitted the jury to hear a recording of a conversation in August 1958 between McKeever and Jack Ball, should be considered, since the question seems likely to arise again on retrial. During the cross-examination of Jack Ball defense counsel sought to play in open court a tape recording of this conversation for the stated purpose of refreshing the witness' memory of the conversation. The trial judge, after listening to the recording three times and trying to get agreement among counsel as to what was said on it,[4] ruled that the

[4] The tape recording was made by McKeever on a Minifon recorder secreted under his coat. *Voir dire* testimony of McKeever (who did not take the stand at the trial) and of other witnesses established the authenticity of the recording to the satisfaction of the trial judge. Playback of the recording took 43 minutes but only the last 16 minutes can be understood with reasonable clarity and apparently only this last part constituted the Ball and McKeever conversation about the indictment and the charges then pending against the appellants. In our opinion the last 16 minutes are sufficiently clear to be heard and understood. Of course in our discussion we do not reach the further point whether a sufficient foundation had been laid before the jury as to the authenticity and accuracy of the recording. It would seem that Ball's admissions alone would not be enough. McKeever did not testify at the trial and none of the *voir dire* testimony was before the jury.

recording could not be played within the hearing of the jury, but permitted Ball to listen to the recording on earphones within view of the jury. Subsequently, the court declined to permit the playing of the tape before the jury for the purpose of impeaching Ball, though he allowed defense counsel to read to the witness and to the jury from a stenographic transcript of the recording many statements of the witness conflicting with his testimony on direct examination.

We find no error in the court's rulings with respect to the tape. Documents shown to a witness for the purpose of reviving his recollection may not be read or shown to the jury, since the documents themselves are not evidence and have no independent evidentiary value. *Portman* v. *American Home Products Corp.*, 201 F. 2d 847, 850 (2 Cir. 1953); Wigmore, Evidence § 763 (3d Ed. 1940). That such material is sought to be introduced on cross rather than direct examination is not a difference of significance. See *Young* v. *United States*, 214 F. 2d 232, 237-38 (D. C. Cir. 1954); *cf.* Wigmore, Evidence § 764 (3d Ed. 1940). Nor should the fact that a tape recording rather than a written document was involved affect the result, since a recording played over earphones to the witness bears a close analogy to a document shown only to the witness.

In our opinion the trial judge was also well advised to deny the defendants the right to play the recording when offered for impeachment purposes. The only relevant portions of the recording were what Ball said to McKeever. The recording, however, contained so many self serving statements by the defendant McKeever that it is doubtful whether any instruction by the trial judge that the jury should not consider McKeever's taped statements as bearing on the truth or falsity of his defense would have been adequate to prevent such consideration. To have permitted the playing of the recording involved in this case would in effect have allowed a witness to give testi-

mony without being sworn and without opportunity for his cross-examination. When, as here, the unsworn witness was the defendant himself, who at no time during the trial took the stand and whom the government was powerless to call as a hostile witness, we think it was a proper exercise of the trial judge's discretion to forbid the playing of the recording.

Moreover, in this case the jury had before it the very words that Ball uttered. From the stenographic transcript of the recording defense counsel real numerous quotations of Jack Ball, inquiring as to whether he had said such words. As a result the jury had Jack Ball's admissions that he had spoken as quoted and his explanation of why he had so spoken to McKeever, including several admissions that his statements to McKeever in the recorded conversation were lies.

The novelty about this tape recording is the fact that it was made after the indictment. The conversation was not a part of any alleged criminal acts or any conspiracy for which a participant was being tried; it was relevant only because it was a different version of what a witness, Jack Ball, said at trial. While there are many reported cases involving the use of recordings as evidence, we have found none which poses the questions here presented. From its very nature only a part of the recording was relevant and that part could not be played separately from what was said by McKeever.

We commend the patience and diligence of the trial judge in solving the problems raised by this proffered proof so that in the end the jury had before it all it was entitled to hear bearing on Ball's credibility and the rights of the defendants and the government were equally protected.

Reversed and remanded for a new trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 4 — October Term, 1959.

(Argued October 6, 1959 Decided November 10, 1959.)

Docket No. 25490

UNITED STATES OF AMERICA, *Appellee*,

v.

MARK ZBOROWSKI, *Appellant*.

Before:

LUMBARD, WATERMAN and FRIENDLY, *Circuit Judges*.

Zborowski appeals from his conviction for perjury before a grand jury in the Southern District of New York, John M. Cashin, *J.* presiding. Reversed because of failure to disclose to the defendant the grand jury testimony of the principal government witness.

HERBERT C. KANTOR, Assistant United States Attorney, Southern District of New York, New York, N. Y. (S. Hazard Gillespie, Jr., United States Attorney, George I. Gordon and Gideon Cashman, Assistant United States Attorneys, on the brief), *for appellee*.

FREDERIC S. NATHAN, New York, N. Y. (Greenbaum, Wolff & Ernst, Morris L. Ernst, and Norman S. Poser, on the brief), *for appellant*.

LUMBARD, *Circuit Judge:*

Mark Zborowski, appealing from his conviction and five year sentence for perjury before a federal grand jury, in violation of 18 U. S. C. § 1621, claims three principal errors requiring reversal: first, that the proof failed to comply with the "two-witness rule" in perjury cases; second, that his testimony was not material to the grand jury investigation; and third, that it was error for the trial judge to refuse to examine and make available to the defendant the grand jury testimony of Jack Soble, the principal government witness. We disagree as to the appellant's first two contentions, but as we find that the trial judge erred in refusing to make available Soble's grand jury testimony, we reverse the conviction and remand the case for a new trial.

The grand jury before which Zborowski is alleged to have sworn falsely, was impaneled in the Southern District of New York in January 1957 and it proceeded to take evidence regarding espionage. Upon the occasion of Zborowski's second appearance before the grand jury on February 20, 1957, he gave testimony under oath which the government charges was perjurious. This testimony related to whether or not he had ever met Jack Soble. The questions and answers are as follows:

> "Q. You have previously said that you never met Jack Soble? A. No. On the basis of the newspapers—
>
> Q. You have never met him. A. Not to my knowledge. Not that I remember.
>
> • • • • • •
>
> Q. Well, if I were to tell you that Jack Soble has stated that he met you in the company of [t]his first contact, would that have any effect on your answer? A. I don't remember. I just don't remember a thing like that.
>
> • • • • •

"I am just telling you truthfully that I don't remember having met Jack Soble."

The indictment charged that Zborowski's testimony was false and that he knew it to be false "in that he knew and had met Jack Soble on various occasions in the years 1943, 1944, 1945, 1946, and 1947."

At the trial Zborowski admitted that he had met Jack Soble on five or six occasions in the years from 1943 through 1946 and that the purpose of his meetings with Soble was to convey to him for the eventual use of the Russian government information concerning the activities of the supporters of Trotsky doctrines in the United States.

The government's case concerned itself with showing in great detail the extent and nature of the Zborowski/Soble relationship, which Soble testified covered a series of meetings at intervals of a week or more for about two years from the spring of 1943 until 1945. Soble also said that the relationship continued on a social basis until sometime in 1947 or 1948. The government urged from these numerous meetings and the extent of the discussions which then took place that Zborowski knew very well who Soble was when he testified before the grand jury.

At trial three F.B.I. agents detailed about fifteen conferences that they had with Zborowski from December 1954 until he was called before the grand jury in February 1957. Zborowski admitted having misled the F.B.I. agents in December 1954 when he denied that he had ever been a Soviet agent. It was undisputed that Zborowski's first admission that he had known Soble came only after the F.B.I. confronted him with Soble on October 7, 1957. Zborowski finally said that he had known Soble as a Soviet agent and that he had passed information to him concerning Trotskyite organizations at five to six meetings. Up to this time he had told the F.B.I. that Chaliapin and

Choundenko had been his only Soviet contacts; after the confrontation he said Soble succeeded Chaliapin and preceded Choundenko as his Soviet principal. Zborowski claimed at the trial that he had not known Soble under that name until he first read newspaper accounts about Soble's arrest in January 1957.

The Two-Witness Perjury Rule Was Complied With

Appellant argues that the "two-witness" requirement in perjury cases has not been met. The two-witness rule requires " 'direct' proof of the crime by two witnesses who testify that the accused violated his oath, or 'direct' proof by one witness plus corroborating circumstances." *United States* v. *Remington*, 191 F. 2d 246, 249 (2 Cir. 1951). We believe that the evidence presented complies with the second alternative method of satisfying the rule. Soble's testimony constituted the direct proof by one witness, and Zborowski's written admissions and trial testimony, coupled with the testimony of the government agents as to (1) the halting and belated nature of defendant's disclosures and (2) the defendant's behavior upon confrontation with Soble, are sufficient corroborating evidence.

The Testimony Was Material to the Grand Jury Investigation Into Espionage

We said in *Carroll* v. *United States*, 16 F. 2d 951, 953 (2 Cir.), cert. denied, 273 U. S. 763 (1927): "A false statement by a witness * * * though not relevant in an essential sense to the ultimate issues pending before the grand jury, may be material, in that it tends to influence or impede the course of the investigation. * * * The test of materiality in a grand jury's investigation is whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation, and, if it does, an indictment for perjury

may be predicated upon it." Where the subject of the grand jury's investigation is espionage activities generally, all leads which the jury can obtain to identify those who have at any time been engaged therein are material. See *Vetterli* v. *United States*, 198 F. 2d 291 (9 Cir.), judgment vacated and case remanded for resentencing, 344 U. S. 872 (1952). Zborowski's testimony was material to the grand jury investigation; his statement that he did not know Jack Soble had a tendency to dissuade the grand jury from making further inquiry into that phase of Zborowski's N.K.V.D. activities which he performed in conjunction with Soble.

Soble's Grand Jury Testimony Should Have Been Disclosed to the Defendant

We find several important inconsistencies in Jack Soble's testimony before the grand jury, from which we conclude that his testimony should have been made available to the defendant.

The only witnesses to any of the alleged meetings between Zborowski and Soble were the two parties themselves. If the jury believed Soble's story of numerous and frequent meetings with lengthy discussions as to a multitude of matters besides the Trotskyite activities, then the jury might well believe that the government had proven beyond a reasonable doubt that Zborowski committed wilful perjury. On the other hand, if the jury believed Zborowski's story that there had been only five or six meetings from 1943 to 1946, eight years before his first questioning by the F.B.I., and over ten years before his alleged perjury, then they might well have a reasonable doubt whether Zborowski was truthfully telling the grand jury what he remembered.

Thus the crucial witness in the case was Jack Soble, and anything bearing upon his memory of details and the time and manner in which they were recollected and reported was highly relev

For many years it has been the unvarying practice in this Circuit[1] to permit defense counsel to use inconsistent grand jury testimony for impeachment purposes. The rule is that when the defendant points out a possible inconsistency between the trial and the grand jury testimony of a government witness and requests the trial judge to examine the witness' grand jury minutes, the trial judge must then read the minutes *in camera*. Finding any substantial discrepancy, he must make available to the defendant the minutes or an intelligible segment thereof containing the inconsistency. But where the trial judge finds no such inconsistency, he should, upon request, seal the grand jury testimony so that it is available on appeal. *United States* v. *Spangelet*, 258 F. 2d 338 (2 Cir. 1958); *United States* v. *Angelet*, 255 F. 2d 383 (2 Cir. 1958); *United States* v. *H. J. K. Theatre Corp.*, 236 F. 2d 502 (2 Cir. 1956), cert. denied, 352 U. S. 969 (1957); *United States* v. *Alper*, 156 F. 2d 222 (2 Cir. 1946).

In this case the trial judge was fully advised that there were inconsistencies between Soble's trial and grand jury testimony. Soble himself admitted that there were inconsistencies. He conceded that he had not told the grand jury about a meeting that he had had with Zborowski in the spring of 1944 regarding the possible defection from the Soviets of Victor Kravchenko. At the trial Soble testified in great detail about this meeting which he said took place around the corner from where he lived at 170th Street and Broadway. Furthermore, as defense counsel pointed out at trial, the government's bill of particulars, with respect to meetings between Zborowski and Soble in the years 1943 through 1947, failed to mention any such meeting or that any meeting had taken place near 170th Street.

[1] *Jencks* v. *United States*, 353 U. S. 657 (1957) and 18 U. S. C. § 3500 are inapplicable to grand jury minutes. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395 (1959).

Moreover, the government's bill of particulars, which could have been based only on information from Soble, differed from Soble's testimony in several other respects; first, regarding the place of the second meeting between Zborowski and Soble; second, the time of day, location and frequency of the meetings; and third, the final year of the meetings. In the bill of particulars it was stated that the meetings took place "at intervals of approximately two weeks or longer until the early months of 1945," while Soble's trial testimony was that some of the meetings were at weekly intervals. These discrepancies between the government's bill of particulars and Soble's trial testimony supported the defense claim that there might be inconsistencies between Soble's grand jury testimony and his trial testimony. Under these circumstances, the trial judge should have examined the grand jury minutes.

It is abundantly clear from the examination of the twenty-four pages of Soble's testimony before the grand jury that there are numerous inconsistencies between his trial and grand jury testimony which are relevant to the issues in the case. Indeed, the government concedes in its brief that there are at least five inconsistencies: (1) In his grand jury testimony Soble failed to make any mention of the meeting at 170th Street in the spring which he claims was attended by Zborowski, Chaliapin, Zubilin and himself. (2) Soble's grand jury testimony did not indicate that his second meeting with Zborowski occurred at a place different from that of their first meeting. (3) Soble's grand jury testimony made no mention of any meetings or contacts with Zborowski in 1948. (4) Before the grand jury Soble testified that Chaliapin introduced Zborowski to him as "Etienne," whereas at the trial Soble stated that Zborowski was introduced as "Mark." (5) Before the grand jury Soble testified that he used to meet Zborowski "once in two weeks, once in a month." At the trial Soble testified that he used to meet him "weekly or every two weeks."

Even if there were no showing of possible inconsistency in the testimony of a witness in a perjury case, or indeed in any case, where the testimony of such witness is the only direct evidence against the defendant and no valid reason for secrecy, exists, the court should upon request examine the grand jury minutes of such a witness for possible inconsistencies. *United States* v. *Spangelet, supra.* The reason for the necessity of such a rule is obvious. See *Jencks* v. *United States*, 353 U. S. 657, 667-68 (1957); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, 407-10 (1959) (dissenting opinion). Surely the defendant should have access to all conflicting testimony given under oath by the one direct witness who gives him the lie. It offends all sense of fairness to first require a showing of possible inconsistency preliminary to examination of the minutes by the trial judge.

The government argues that even if it was error for the trial judge not to make the grand jury minutes available to the defendant, that, in any event, this grand jury testimony would have been "unimportantly cumulative as an impeachment device."[2] We do not agree.

The government points out that Soble was subjected to intense and detailed cross-examination for nearly three days; that defense counsel had available for this purpose the reports of several doctors at both state and federal institutions including the complete medical treatment dossier maintained at the Medical Center for Federal Prisoners; that the defense had available numerous F.B.I. reports of interviews with Soble and Soble's reports and correspondence to his Soviet superiors which had been

[2] The government cites for this proposition *United States* v. *H. J. K. Theatre Corp.*, 236 F. 2d 502 (2 Cir. 1956) and *Parr* v. *United States*, 265 F. 2d 894 (5 Cir. 1959). Neither of these cases support this contention. In *H. J. K. Theatre Corp.* the court ruled that the defendant was entitled to have the contradictory grand jury testimony read into the record. In *Parr* the defendant made no request that the court examine the minutes *in camera*.

intercepted. The government further points out that the jury had before it considerable evidence on the basis of which it could have disbelieved Soble's trial testimony, such as evidence of his serious mental condition, his attempt to commit suicide by eating one and one-half pounds of nuts and bolts, the "unresponsive, disoriented, incoherent" nature of his testimony, his own plea of guilty in April 1957 to a charge of espionage, and Soble's admissions that he had lied to the F.B.I. over a long period of time regarding his activities and had made misstatements to other governmental authorities on numerous occasions.

Of course the fact that there was available to the defense a great mass of other data with which to impeach Soble can be no answer to the failure to produce the grand jury minutes if there were in those minutes any statements or omissions which were inconsistent with the witness' testimony at the trial.

Moreover, Soble's grand jury testimony by reason of the very fact that it was under oath and before a grand jury had about it a character and an importance far greater than any of the other impeaching evidence. Indeed when the central issue at stake is the memory of a defendant as to events which are over ten years old, what could be more important than to disclose to the trial jury similar lapses of memory on the part of the principal government witness when he was under oath and after he had given considerable thought over a long period of time to the matters under investigation. None of the other impeaching data was nearly as important as the discrepancies between Soble's grand jury and trial testimony.

It is not for an appellate court to speculate how much difference the grand jury testimony might have made in the deliberations of the trial jury. *Rosenberg* v. *United States*, 360 U. S. 367, 371 (1959). No one can ever say in a particular case just what bit of evidence might turn

the tide one way or the other. In every case where a jury has rendered a conviction and where other impeaching evidence is available, it could be argued that the grand jury evidence was merely cumulative. But of course the point of allowing free and full cross-examination of an important witness is to permit this very cumulation of evidence. So long as evidence of this nature is relevant it ought to be freely available to a defendant for whatever use he may wish to make of it.

We also think it appropriate to point out that the government should not have stood mute when the trial judge refused to read the minutes. We repeat and reemphasize what we said in August of 1958, just a few months before the trial of this case, in *United States* v. *Spangelet*, *supra* at 342:

> "[w]e suggest that a prosecutor, who by opposing a defendant's access to grand jury minutes casts the burden of comparison upon the court, owes the court his own best effort himself to locate inconsistencies and the duty of calling to the attention of the court answers which might be classified as inconsistent. For the prosecutor has had an opportunity to absorb the content of the grand jury minutes before trial and thus is in a better position than the judge to spot inconsistencies with the testimony on trial as it develops."

The Assistant United States Attorney must have known generally what was in the minutes and if he could not recollect all the details it would have taken but a few minutes to refresh himself regarding the twenty-four pages of Soble's testimony. Reference to that testimony would have made apparent the discrepancies in the testimony which the government had listed in its brief. Indeed, with the knowledge of what was in the minutes it would have been appropriate for the government, with the court's consent, to turn over the minutes to the defendant as soon as the

question was raised. There should have been no need for the defense to ask the trial judge to scrutinize the minutes. Here no useful purpose whatever could possibly be served by failure to disclose Soble's grand jury testimony as there was no longer any need for secrecy.[3]

The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried. In the long run it is more important that the government disclose the truth so that justice may be done than that some advantage might accrue to the prosecution toward ensuring a conviction. *Berger* v. *United States*, 295 U. S. 78, 88 (1935).

The requirement that the government must prove its case beyond a reasonable doubt means, at the very least, that the government itself should not, by any failure to disclose relevant evidence, prevent the defendant from producing evidence which might create the reasonable doubt. Our standards of fair play in federal criminal proceedings require that the government should present its evidence in its true colors, and that it should never be a party to withholding any evidence which materially bears on the credibility of a witness it places on the stand. Thus it would seem to be better practice, and a saving of considerable time to all concerned, in cases such as this, where there are obvious discrepancies on material matters, for the government to make such grand jury minutes available to the defense at the end of the direct examination.

For these reasons we conclude that Zborowski's defense was substantially prejudiced by the failure to make available Soble's grand jury testimony.

Appellant also complains that the government unduly interjected evidence of espionage although the charge was

[3] None of the five reasons listed in *United States* v. *Rose*, 215 F. 2d 617, 628-29 (3 Cir. 1954) for keeping grand jury minutes secret is present in this case.

perjury, and that this prevented him from receiving a fair trial. Of course as the perjury had to do with defendant's espionage and his relations with others engaged in such activities, to some extent the subject could not be avoided. The trial testimony did go pretty far afield, and the trial was unduly lengthened because of the voluminous testimony about the cloak-and-dagger activities of Zborowski, Soble and others in Eurpose during the 1930's. However, this was as much the defendant's choosing as it was the government's. Defense counsel made little attempt to confine Soble's ramblings to what was relevant. It appears that the defense strategy was to let Soble talk at great length about everything, presumably in the hope of casting doubt on his sanity and motive. Indeed the defendant himself introduced much testimony dealing with espionage. Having embraced the course of opening wide the doors, the appellant will not be heard to complain when the result has proven adverse.

Reversed and remanded for a new trial.